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Conforming Doctrine to Practice: Making for Collateral Consequences in the Missouri Mootness Analysis

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I. INTRODUCTION

As the collateral consequences of court judgments gain increased recognition, courts in many states have modified traditional doctrinal approaches to mootness in order to give due regard to these repercussions. Missouri has not formally joined these states, yet a survey of recent mootness analyses within the state indicates that courts are seeking to allow for consideration of such consequences in spite of the doctrinal constraints. This tension has been most evident in appellate review of expired orders of protection for domestic violence, and the result has been vast inconsistency both in how courts approach the issue and how it is ultimately resolved. This article will seek to identify the underlying concerns that have fostered this unpredictability in Missouri, while also examining the advantages and disadvantages of the approaches taken in jurisdictions recognizing a collateral consequences exception to the mootness doctrine. In conclusion, this article will propose a new doctrinal approach in Missouri that reflects judicial concerns about collateral consequences without frustrating the purpose of the mootness doctrine in an adversarial system.

II. LEGAL BACKGROUND

A. The Missouri Adult Abuse Act and Child Protection Orders Act

Each year, individuals subjected to abuse file tens of thousands of petitions in Missouri courts seeking orders of protection to shield them from abusive family members and stalkers.[1] In doing so, they turn to two acts of the Missouri legislature – the Missouri Adult Abuse Act[2] and the Child Protection Orders Act[3] – which were specifically adopted in order to protect adults and children from abusive relationships, many of which occur within the home.

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1. *See* JENNY JONES, DOMESTIC VIOLENCE VICTIM'S SERVICES – A PRELIMINARY ANALYSIS, REPORT II-2006 (2006), *available at* http://truman.missouri.edu/uploads/Publications/IPP%2011-2006%20Victim's%20Services.pdf. Jones estimates that 39,000 petitions were filed in 2002, and this figure does not include petitions filed on behalf of abused children. *Id.* at 3.

2. MO. REV. STAT. §§ 455.010-.090 (2000 & Supp. 2007).

3. MO. REV. STAT. §§ 455.500-.538 (2000 & Supp. 2007).

The Adult Abuse Act, originally enacted in 1980, was the Missouri legislature's initial response to the problem of domestic violence.[4] Broadly speaking, the Act "authorizes and controls the issuance of protection orders by state courts, imposes criminal penalties for violations, and requires law enforcement to give domestic violence calls the same priority as any similar offense involving strangers."[5] The Missouri legislature, "[p]erceiving that abusive persons often behave no better toward children than adults," then passed the Child Protection Orders Act (CPOA) in 1987.[6] While substantially similar to the Adult Abuse Act in terms of procedure and remedies, the CPOA also allows third parties to bring actions on behalf of children and contains different definitions of certain terms.[7]

Under the Adult Abuse Act, any adult can petition for an order of protection (as the "petitioner") and the CPOA allows a parent, guardian or juvenile officer to do the same on behalf of a child.[8] Both Acts make such orders available to protect against abuse[9] or conduct within the statutory definition of stalking.[10] In cases of immediate danger, a petitioner may obtain an ex parte order.[11] Under the Adult Abuse Act, the petitioner then receives a hearing within fifteen days for a full order of protection, barring good cause for a

4. David H. Dunlap, *Trends in Adult Abuse and Child Protection*, 66 UMKC L. REV. 1, 1 (1997).

5. Damon Phillips, *Civil Protection Orders: Issues in Obtainment, Enforcement and Effectiveness*, 61 J. MO. B. 29, 29 (2005). The Act in its original form was limited to instances of violence between opposite-sex household members, but later amendments broadened the scope to other forms of abuse, including stalking, committed by persons other than same-sex co-habitants. Dunlap, *supra* note 4, at 2-3. Specifically, the 1986 amendment defined "abuse" as including sexual assault, coercion, unlawful imprisonment, and harassment, and "softened" the previous definitions of assault and battery. *Id.* at 2. The 1993 amendment removed the opposite-sex distinction and added stalking to the list of actionable categories of conduct. *Id.* at 3.

6. Dunlap, *supra* note 4, at 7.

7. *See infra* notes 9-10.

8. MO. REV. STAT. § 455.010(8) (Supp. 2007) (adults); MO. REV. STAT. § 455.503.2 (2000) (parents, guardians, or juvenile officers on behalf of children).

9. Note that the Adult Abuse Act and Child Protection Orders Act define "abuse" in slightly different ways. MO. REV. STAT. § 455.010(1) (for adults: assault, battery, coercion, harassment, sexual assault, or unlawful imprisonment); MO. REV. STAT. § 455.501(1) (Supp. 2007) (for children: non-accidental physical injury and sexual or emotional abuse, excluding spanking "administered in a reasonable manner").

10. MO. REV. STAT. § 455.010(10) (stalking an adult is defined as "purposely and repeatedly engag[ing] in an unwanted course of conduct that causes alarm to another person when it is reasonable in that person's situation to have been alarmed by the conduct"); MO. REV. STAT. § 455.501(10) (retaining the same conduct definition for the stalking of children but imposing the reasonable belief standard on "another adult").

11. MO. REV. STAT. § 455.040.1 (Supp. 2007).

continuance.[12] At the hearing, the court will grant a full order of protection for no less than 180 days and no longer than one year if the petitioner proves her allegations by a preponderance of the evidence.[13] The CPOA follows essentially the same procedure, but any grant of a full order of protection is discretionary, even if the court finds the petitioner met her burden of proof.[14]

The direct consequences of the issuance of a protective order against an individual pursuant to the Adult Abuse Act or the CPOA are wide-ranging. An order under the Adult Abuse Act may also prevent the respondent from entering the victim's dwelling,[15] which in many cases will be the respondent's home.[16] Additionally, upon issuing a full order of protection pursuant to the Adult Abuse Act, the court may also award custody of a minor child, award child support and maintenance, and require that the respondent continue to make rent or mortgage payments on the previously-shared residence or begin paying rent on a new residence.[17] Once an order is issued, whether ex parte or full, a violation of its terms is a class A misdemeanor and becomes a class D felony if the respondent has violated another order within the preceding five years.[18] Due to these potentially harsh consequences, the CPOA, which allows for discretionary orders with essentially the same requirements,[19] "has become a favored vehicle for litigation of child custody questions."[20]

The collateral consequences of a full order of protection may also be significant. Missouri courts have noted the impact of the general "stigma" of having a court determine that, for example, an individual is a "stalker."[21] Additionally, the repercussions of a full order of protection may manifest themselves in connection with certain statutory licensing procedures,[22] and

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12. *Id.*

13. *Id.*

14. MO. REV. STAT. § 455.516.1 (Supp. 2007). "[I]f the petitioner has proved the allegation of abuse of a child by a preponderance of the evidence, the court *may* issue a full order of protection for at least one hundred eighty days and not more than one year." *Id.* (emphasis added).

15. MO. REV. STAT. § 455.050.1(2) (2000).

16. Phillips, *supra* note 5, at 30.

17. MO. REV. STAT. § 455.050.3(1)-(12) (also allowing for ordered counseling, payment of court costs, and "temporary possession of specified personal property, such as automobiles, checkbooks, keys, and other personal effects").

18. MO. REV. STAT. § 455.085.7-.8 (2000).

19. MO. REV. STAT. § 455.523.2(1)-(8) (2000).

20. Dunlap, *supra* note 4, at 8.

21. *See, e.g.*, Stiers v. Bernicky, 174 S.W.3d 551, 553 (Mo. App. W.D. 2005) (per curiam); Glover v. Michaud, 222 S.W.3d 347, 351 (Mo. App. S.D. 2007).

22. *See, e.g.*, MO. REV. STAT. § 210.482.1(1) (Supp. 2007) (juvenile courts in authorizing emergency placement of child in home may first request background check including full orders of protection for every adult household member); MO. REV. STAT. § 210.487.1(1) (Supp. 2007) (foster parent licensing requires background check including full orders of protection for every adult household member); MO.

employers may require disclosure of protective orders by individuals seeking employment.

Protective orders may have consequences in civil suits seeking damages as well. One commentator has remarked that while protective orders "are not meant as a tool for obtaining civil damages, they may be helpful to a victim in that respect as well."[23] A protective order may also support a key element in negligence actions based on police inaction in the face of domestic violence, as it is evidence of a "special relationship" based on direct contact between the police and the alleged victim, which then gives rise to a reasonableness standard in assessing the police failure to act.[24]

B. Critiques and Criticisms

The Adult Abuse Act and the CPOA are largely regarded as effective and important tools in protecting victims of domestic violence, but that is not to say that there has been no criticism.[25] In general, critiques have focused on the potential for misuse of protective orders and the corresponding effect on persons against whom orders have been issued.

For example, Judge David Dunlap of Missouri[26] has noted that the Adult Abuse Act poses different problems with regard to two distinct classes: "traditional" litigants – persons seeking relief against another in a present domestic relationship; and "nontraditional" litigants, or everyone else.[27] For "traditional" litigants, the issue is that in practice the Adult Abuse Act is often employed "as an adjunct to (or among the very poor, a surrogate for) dissolution of marriage proceedings."[28] The Act's provisions allow parties to appear *pro se*, without court costs, and have the court determine issues such as asset allocation, child custody, and spousal support.[29] This has been problematic for many courts, as "[j]udges are understandably loath to address such issues in a primitive setting lacking discovery, formal pleadings or participation of counsel; but the law says they must."[30] On the other hand, according to Dunlap,

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REV. STAT. § 571.104.1(1) (Supp. 2007) ("A concealed carry endorsement . . . shall be suspended or revoked . . . upon the issuance of a valid full order of protection.") Note that these consequences may then lead to additional repercussions, for example if an individual requires a concealed carry license in order to carry out his employment.

23. Phillips, *supra* note 5, at 30.

24. *Id.* at 30-31.

25. *See generally* David H. Dunlap, *The Adult Abuse Act: Theory vs. Practice*, 64 UMKC L. REV. 681 (1996); Dunlap, *supra* note 4; Phillips, *supra* note 5.

26. Circuit Court of Howell County, Missouri.

27. Dunlap, *supra* note 4, at 3, 5.

28. *Id.* at 5-6.

29. *Id.* at 6. *See also* MO. REV. STAT. § 455.050 (2000) (providing that ex parte or full orders of protection may include orders specific to these issues).

30. Dunlap, *supra* note 4, at 6.

the "nontraditional" cases primarily consist of "[c]omplaints . . . of small outrages long considered beneath the threshold of judicial involvement," and judges routinely grant the requested relief based mostly on a desire to end the proceeding without a courtroom conflict.[31] The use of protective orders for these "small outrages," such as disputes between neighbors, is clearly an unintended result of the Adult Abuse Act, yet the practical concerns voiced by Dunlap make it easy to understand how this practice has persisted.

These effects may also raise concerns regarding the constitutional rights of an individual against whom an order of protection is granted. In 1982, the Missouri Supreme Court entertained an early challenge to the Adult Abuse Act on procedural due process grounds in the case of *State ex rel. Williams v. Marsh*.[32] Analyzing the Act's allowance of ex parte orders depriving an individual of a property interest in his home and a liberty interest in child custody, the court in that case found that these interests were outweighed by the governmental interest in protecting abuse victims and preventing further abuse.[33] The court also held that the existing procedural safeguards were adequate to protect against erroneous deprivation of the respondent's constitutionally-protected rights.[34] At the time of the litigation in *Williams*, however, the Adult Abuse Act was in its pre-amendment form and now is significantly broader in scope.[35] This has led one commentator to note with surprise that the Missouri Supreme Court has not reconsidered the constitutionality of these "astonishing liberalizations, notwithstanding the fact that they far outrun the original legislative rationale so carefully upheld in *Williams*."[36]

C. Mootness & Collateral Consequences in Missouri

Given the issues outlined in the preceding sections, it is not surprising that certain individuals seek appellate review of protective orders issued against them. The problem, however, is that full orders of protection, limited to a one-year duration in Missouri,[37] often expire before an appellate court

31. *Id.* at 4-5. Dunlap further noted that over a one-year period from 1995-96 in his court, these "nontraditional" cases made up 54% of the Adult Abuse docket. *Id.* at 4. "Typically the judge grants a full order of protection . . . without full recitation of the sordid facts, in hopes of forestalling courtroom reenactment of street behavior. . . . Confounded by the vain task of applying such fluid concepts as harassment and stalking, judges readily afford protection to anyone, upon no further showing than a desire to be spared the company of designated others." *Id.* at 5.

32. 626 S.W.2d 223 (1982) (en banc).

33. *Id.* at 230-31.

34. *Id.* at 232. The court analyzed ex parte orders awarding custody or residence as being analogous to outright seizures and held that the Act still passed constitutional muster. *Id.* at 232.

35. *See supra* note 5.

36. Dunlap, *supra* note 4, at 3.

37. MO. REV. STAT. § 455.040.1 (Supp. 2007) (Adult Abuse Act); MO. REV. STAT. § 455.516.1 (Supp. 2007) (CPOA).

has the opportunity to consider the case.[38] The following section will first examine court approaches to this issue in Missouri, and will then explore how other jurisdictions seek to address the tension between mootness and lingering collateral consequences.

Under Missouri law, an issue is moot and will not be considered on appeal "[w]hen an event occurs that makes a court's decision unnecessary or makes the court's granting of relief impossible."[39] Missouri courts, however, recognize two distinct exceptions to this doctrine.[40] The first occurs when the event in question occurs after the case has been submitted and argued.[41] The second is commonly known as the "public interest" exception.[42] Missouri courts consistently refer to this exception as a narrow one, and it is only available if the issue is not likely to be "present in a future live controversy practically capable of review."[43] This exception – the one implicated most in connection with orders of protection – makes dismissal discretionary when an issue on appeal "is one of general public interest and importance, [is] recurring in nature, and will otherwise evade appellate review."[44] Essentially, the exception is designed to provide an outlet for efficiently resolving significant legal inconsistencies or vagueness through a single court proceeding when the issue may otherwise not present itself before appellate tribunals.

The grant of a full order of protection is statutorily-defined as an appealable final judgment.[45] When appealing an expired protective order,[46] parties generally turn to the public interest exception in an attempt to convince the court to entertain their appeals.[47] Responses by Missouri courts have been

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38. *See, e.g.*, Glover v. Michaud, 222 S.W.3d 347, 350 (Mo. App. S.D. 2007); O'Banion v. Williams, 175 S.W.3d 673, 675 (Mo. App. W.D. 2005); Reay v. Philips, 169 S.W.3d 896, 896 (Mo. App. E.D. 2005).

39. *In re* Dunn, 181 S.W.3d 601, 604 (Mo. App. E.D. 2006).

40. *Id.*

41. *Id.*

42. *Id.*

43. State *ex rel.* Chastain v. City of Kansas City, 968 S.W.2d 232, 237 (Mo. App. W.D. 1998) ("This exception . . . is narrow. If an issue of public importance in a moot case is likely to be present in a future live controversy practically capable of appellate review, then the 'public interest' exception does not apply."). *See also* State *ex rel.* Mo. Gas Energy v. Pub. Serv. Comm'n, 224 S.W.3d 20, 25 (Mo. App. W.D. 2007); *In re* Duvall, 178 S.W.3d 617, 623 (Mo. App. W.D. 2005) (quoting *Chastain*, 968 S.W.2d at 237).

44. *Mo. Gas Energy*, 224 S.W.3d at 25.

45. MO. REV. STAT. § 455.060.1 (Supp. 2007).

46. One may ask why an individual would appeal an expired order. In short, it depends. For some, there may be legitimate concerns about the continuing consequences of such an order, as discussed *infra* Part III.C and in Part IV generally. For others, it may be simply the desire for personal vindication – a reaction to feeling "wronged" by the issuance of the order.

47. *See, e.g.*, Pope v. Howard, 907 S.W.2d 257, 258-59 (Mo. App. W.D. 1995) (per curiam) (appellant contending, and court rejecting, that lack of cases interpreting

anything but consistent, and this appears to result from how a court determines what issue must be of "general public interest": is it the applicability of the Acts, the point on appeal, or the vindication of the appellant?[48]

1. Issue of General Public Interest: Applicability of the Acts

One approach is to frame the "matter of general public interest" as the applicability of the Adult Abuse Act or the CPOA as a whole.[49] Confronting the issue from this angle, the Southern District Court of Appeals in *In re A.T.H.* subtly (or not so subtly) modified the test for the "public interest" exception from its standard form in order to allow for a court determination.[50] Instead of requiring that the issue "will recur" and "will evade appellate review" in future live controversies,[51] the court found that the appeal satisfied the test because "[t]he applicability of the [CPOA] . . . under factual situations similar to the one here *may well be* of a recurring nature, and the issues raised here *could* evade appellate review."[52]

Under this rationale, it would appear that *all* appeals of expired protective orders would fall within the "public interest" exception up to the point where the applicability of the Adult Abuse Act or the CPOA is no longer of "general public interest." At that point, however, *all* such appeals would be moot. Needless to say, this result raises more questions than it answers. If it means that courts must address every notable factual scenario before the Acts are no longer of public interest, how is a court to determine when this point has been reached? Likewise, if it indicates a timeframe after which courts will consider the Acts to have been sufficiently "settled" through interpreta-

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stalking provisions of Missouri Adult Abuse Act brings issue within the public interest exception).

48. *See, e.g.*, Stiers v. Bernicky, 174 S.W.3d 551, 553 (Mo. App. W.D. 2005) (per curiam) (public interest exception applies due to "stigma" of adjudication and potential of disclosure requirement in employment and licensure contexts); Reay v. Philips, 169 S.W.3d 896, 897 (Mo. App. E.D. 2005) ("Although Appellant may believe he has compelling personal reasons for his appeal, . . . this is not the type of case falling within the general public interest exception."); Leaverton v. Lasica, 101 S.W.3d 908, 910 n.3 (Mo. App. S.D. 2003) (stating exception and exercising discretion to hear appeal without further discussion); Toll v. Toll, 882 S.W.2d 290, 291 (Mo. App. W.D. 1994) (per curiam) (discussing exception and concluding that "[t]his appeal presents no issue of public importance which has not been decided."). Note that the inconsistency is not only in the form of a district split, but is intra-district as well.

49. *See, e.g., In re* A.T.H., 37 S.W.3d 423, 426 (Mo. App. S.D. 2001); *In re* R.T.T., 26 S.W.3d 830, 834 (Mo. App. S.D. 2000) (per curiam). While these cases both concern the CPOA, nothing would preclude application of this approach to the Adult Abuse Act.

50. 37 S.W.3d at 426.

51. *Pope*, 907 S.W.2d at 258.

52. *In re A.T.H.*, 37 S.W.3d at 426 (emphasis added).

tion, application of the "public interest" exception will suffer from the same uncertainty.

2. Issue of General Public Interest: Point on Appeal

Another approach to this issue is to simply dismiss the appeal as moot and hold that an appeal of an expired protective order is not permissible under the "public interest" exception;[53] yet even this approach may be more ambiguous than it appears. In *Toll v. Toll*, for example, the Western District of Missouri Court of Appeals presented the question as "whether the appeal puts at stake some legal principle on a public question not previously [decided]" and held that a challenge to the sufficiency of the evidence did not.[54] The court explicitly stated that because the issue on appeal was the sufficiency of the evidence to support the grant of the order, it was not an "issue of public importance."[55] Then, however, the court concluded that "[t]he vindication of Alfred Toll is not of sufficient gravity, from a public standpoint, to cause us to waive the mootness of the appeal."[56] Nevertheless, this language implicitly suggests that the issue of public importance, in some undefined set of circumstances, *could* be an individual's vindication and *not* the sufficiency of the evidence.

In *Reay v. Philips*, the Eastern District followed this same general approach, but it also focused on its own inability to fashion relief given that the order had expired.[57] The court further noted that it had taken the seemingly unusual step of issuing an order to the appellant instructing him to give cause as to why his appeal should be heard.[58] The appellant responded that the order was a "blemish on his legal record," and the court concluded without detailed discussion that "this is not the type of case falling within the general public interest exception."[59] Again, as in *Toll*, the court's request for cause suggests that it would be possible for an individual to show compelling reasons that would convince the court to consider the appeal. Therefore, a more accurate restatement of the holdings in *Toll* and *Reay* may be that a challenge

53. *See, e.g.*, Jenkins v. McLeod, 231 S.W.3d 833, 835 (Mo. App. E.D. 2007); Snyder v. Snyder, 136 S.W.3d 843, 843 (Mo. App. E.D. 2004) (per curiam); Oplotnik v. Alexander, 105 S.W.3d 923, 923 (Mo. App. W.D. 2003); McGrath v. McGrath, 939 S.W.2d 46, 47 (Mo. App. W.D. 1997); *Pope*, 907 S.W.2d at 258-59; Toll v. Toll, 882 S.W.2d 290, 291 (Mo. App. W.D. 1994) (per curiam).

54. 882 S.W.2d at 291.

55. *Id.*

56. *Id.*

57. 169 S.W.3d 896, 896 (Mo. App. E.D. 2005). "A decision by this Court . . . is unnecessary and it is impossible for us to grant any relief." *Id.*

58. *Id.* at 897.

59. *Id. See also* Flaherty v. Meyer, 108 S.W.3d 131, 132 (Mo. App. E.D. 2003) (per curiam). In *Flaherty*, the court issued an order to show cause to which the appellant did not respond, and the court then determined the appeal was moot. *Id.*

to the sufficiency of the evidence in connection with an expired protective order is not *usually* allowed under the "public interest" exception.

3. Issue of General Public Interest: Vindication of Appellant

The third and most recent approach treats the respondent's vindication, made compelling by the collateral consequences of the adjudication, as the "issue of general public importance" in order to allow for a court determination under the "public interest" exception.[60] For instance, in *Stiers v. Bernicky*, the Western District concluded that the appeal at issue was not moot by focusing on both the stigma attached to being adjudicated a stalker and the difficulty in obtaining review before expiration of the order.[61] The court noted that the "stigma does not disappear simply because the order has expired" because an individual may be required to disclose the order in connection with applications for licensure and employment.[62] The problem with framing the issue as the individual's vindication, of course, is that it plainly does not fulfill the requirements of the "public interest" exception.[63] It is difficult to logically conclude that the vindication of *one* adjudicated stalker or abuser is an "issue of *general public interest*," and if the issue is in fact the individual's vindication, then it also cannot be "recurring in nature."

These three divergent approaches reflect the inability of Missouri courts to reach equitable results within the existing analytical framework of the mootness doctrine and its exceptions. In response to this type of problem, many jurisdictions have adopted distinct collateral consequences exceptions. The next section will examine the approaches taken in Minnesota and Connecticut.

D. Mootness & Collateral Consequences in Other Jurisdictions

Like Missouri courts, many jurisdictions struggle with the tension between the mootness doctrine and the recognition of collateral consequences.

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60. *See, e.g.*, Glover v. Michaud, 222 S.W.3d 347, 351 (Mo. App. S.D. 2007); Stiers v. Bernicky, 174 S.W.3d 551, 553 (Mo. App. W.D. 2005) (per curiam); *see also* Leaverton v. Lasica, 101 S.W.3d 908, 910 n.3, 912 (Mo. App. S.D. 2003) (court exercising discretion to hear appeal without discussion of rationale but later emphasizing that "'[t]he potential for abuse of the stalking provision of the Adult Abuse Act is great. And, the harm that can result is both real and significant, not the least of which will be the stigma that attaches by virtue of a person having been found to be a stalker'") (quoting Wallace v. Van Pelt, 969 S.W.2d 380, 387 (Mo. App. W.D. 1998)).

61. 174 S.W.3d at 553.

62. *Id. See also Glover*, 222 S.W.3d at 350-51. The court in *Glover*, while purporting to base its exercise of discretion on the "public interest" rationale of *In re A.T.H.*, also discussed the collateral consequences of the adjudication in reaching its determination. *Id.* at 351 (citing *Stiers*, 174 S.W.3d at 553).

63. *See supra* note 44 and accompanying text.

In response, courts are increasingly carving out an additional exception for collateral consequences, although there is no universally agreed-upon approach.[64] In several states, courts simply recognize the existence of an additional collateral consequences exception to the mootness doctrine, without providing specific guidance as to what the exception entails.[65] This approach, unsurprisingly, has suffered from a lack of explicit standards for courts and parties to follow in assessing what type of repercussions implicate the exception.[66] Specifically, courts employing such vaguely-defined exceptions have

64. *See infra* notes 65-87 and accompanying text. Note that while the Missouri analysis was confined to civil cases involving protective orders, where the tension between mootness and collateral consequences in Missouri law presents itself, this survey of case law in other jurisdictions looks at collateral consequences in civil proceedings generally.

65. *See, e.g.*, Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992) (*legal* collateral consequences preclude mootness dismissal); Roark v. Roark, 551 N.E.2d 865, 868 (Ind. Ct. App. 1990) ("An appeal may be heard which might otherwise be dismissed as moot where leaving the judgment undisturbed might lead to negative collateral consequences."); Shah v. Richland Mem'l Hosp., 564 S.E.2d 681, 687 (S.C. Ct. App. 2002) ("[I]f a decision by the trial court may . . . have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case."); *In re* Cummings, 13 S.W.3d 472, 475 (Tex. App. 2000) ("The collateral consequences' exception has been applied when Texas courts have recognized that prejudicial events have occurred whose effects continued to stigmatize individuals long after the judgment has ceased to operate."). This requirement of some degree of demonstrable collateral consequences appears to be loosely based on the constitutional standard for justiciability in Article III courts, but the federal approach does not allow for a court to presume such consequences. *See, e.g.*, Spencer v. Kemna, 523 U.S. 1, 14 (1998) (requiring appellant to demonstrate collateral consequences that meet "Article III's injury-in-fact requirement" in order to avoid dismissal for mootness). States naturally may choose to adopt this standard as a matter of state law but are obviously not confined by the requirements of Article III.

66. A general survey of the case law in these jurisdictions suggests that courts essentially have unguided discretion under such a broadly-worded exception to determine on a case-by-case basis whether the appeal at bar fits into the exception. The Florida Supreme Court, for example, held that the possibility of the imposition of a lien for unpaid medical services was sufficient to render an appeal of an involuntary commitment not moot even though the appellant had since been released from custody and there was no evidence regarding whether the state actually would seek to impose a lien. *Godwin*, 593 So. 2d at 213-14. In the same opinion, the court held, without detailed discussion, that restrictions on driving, voting, and carrying concealed weapons which would result from the commitment, while "significant," were *not* sufficient to implicate the state's collateral consequences exception. *Id.* at 214. The court also suggested that the societal stigma of an involuntary commitment would be insufficient. *Id.* Subsequently, at least one lower Florida court has read *Godwin*, somewhat reluctantly, as requiring an appellate court to hear any appeal of an order of involuntary commitment due to the "possible imposition of liens and claims for unpaid fees." L.B. v. State, 819 So. 2d 922, 922 (Fla. Dist. Ct. App. 2002) (per curiam)

struggled in determining whether demonstrable collateral consequences are required, or whether the possibility of repercussions of the judgment suffices.[67] The consequence of this vagueness has been that a court's discretion is often the determining factor as to whether an appeal will be heard.[68]

With these considerations in mind, Minnesota and Connecticut have attempted to create narrower collateral consequences exceptions in an effort to provide courts with standards for determining when the collateral consequences of a judgment will overcome traditional mootness concerns.

1. Minnesota: A Rebuttable Presumption of Collateral Consequences

In *In re McCaskill*, the Minnesota Supreme Court outlined the state's collateral consequences exception in an appeal of a statutory civil commitment due to mental illness.[69] Minnesota's exception essentially provides the

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("Under most standards of review this case would be moot . . . . However, we are bound by the decision . . . in *Godwin* . . . .").

67. In Texas, for example, the collateral consequences exception is applicable where "prejudicial events have occurred whose effects continue[] to stigmatize individuals long after the judgment has ceased to operate." *In re Cummings*, 13 S.W.3d at 475. While this appears to require some sort of existing harm, at least two Texas courts have recognized speculative future consequences as relevant. *See In re* Salgado, 53 S.W.3d 752, 757-58 (Tex. App. 2001) (protective order granting custody could potentially give rise to standing in a suit to establish a parent-child relationship); *In re Cummings*, 13 S.W.3d at 475 (consequence of protective order that court could consider order in future child custody action). Note that in *Cummings*, the court also found that the social stigma of a protective order was relevant, 13 S.W.3d at 475, which raises the question of whether a judgment producing a social stigma with no legal repercussions could qualify under the exception.

68. *See, e.g.*, Roark v. Roark, 551 N.E.2d 865, 867 (Ind. Ct. App. 1990) ("An appeal *may* be heard which might otherwise be dismissed as moot where leaving the judgment undisturbed might lead to negative collateral consequences.") (emphasis added). In other words, the exception indicates that the final determination as to whether the appeal will be heard rests with the court, regardless of the degree of collateral consequences shown. *Id.* In *Roark*, the court ultimately decided to hear the appeal of a lower court determination that the appellant's children were "Children In Need of Services," despite the fact that the children had since been removed from foster care and returned to the appellant. *Id.* at 867-68. The court undertook a detailed examination of the collateral consequences of the lower court's judgment and noted, among other things, that the record would be available in future pre-sentence investigations and to numerous state agencies, in addition to being available for impeachment purposes in a criminal case or for introduction in future custody or support actions. *Id.* at 868. The speculative nature of these consequences emphasizes the amount of judicial discretion in Indiana's collateral consequences exception.

69. 603 N.W.2d 326, 331 (Minn. 1999) (en banc). *McCaskill* was the court's extension of the collateral consequences exception to a civil proceeding. *Id.* at 329. The court introduced the doctrine, in its current form, in a criminal case. *See* Morrissey v. State, 174 N.W.2d 131, 133 (Minn. 1970).

appellant with two options for demonstrating that his appeal is not moot.[70] First, the appellant may introduce evidence demonstrating that collateral consequences have in fact resulted from the judgment, in which case the appeal is not moot.[71] If the appellant fails or declines to do so, however, he still has a second option.[72] Here, the court asks whether "'real and substantial' disabilities attach to [the] judgment."[73] If the court answers in the affirmative, that determination raises a rebuttable presumption of collateral consequences, which can be overcome "only by showing 'there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged [judgment].'"[74]

In *McCaskill*, the court held that the appeal was not moot due to the collateral consequences of the appellant's involuntary commitment, specifically the possibility of the judgment being a basis for future early intervention or involuntary commitment.[75] To its credit, the test of whether "real and substantial disabilities attach to the judgment" does provide courts with some guidance. It calls for an explicit finding which determines whether the appeal will be heard, as opposed to being merely a threshold determination that makes the mootness decision discretionary. Real concerns remain, however, as to whether the "real and substantial disabilities" test is too vague to result in consistent determinations.[76]

2. Connecticut: A "Reasonable Possibility" of Collateral Consequences

In *Putman v. Kennedy*, the Connecticut Supreme Court considered the mootness of a consolidated appeal of several expired ex parte restraining or-

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70. *McCaskill*, 603 N.W.2d at 329.

71. *Id.*

72. *Id.*

73. *Id.* (citing *Morrissey*, 174 N.W.2d at 133).

74. *Id.* (alteration in original) (quoting Sibron v. New York, 392 U.S. 40, 57 (1968)).

75. *Id.* at 331.

76. The problem, of course, lies in how a court is to determine what constitutes "real and substantial disabilities," especially given that the court in *McCaskill* held that speculative future consequences satisfied the test. *See, e.g.*, Beuning v. Beuning, No. A06-242, 2007 WL 152118, at *2 (Minn. Ct. App. Jan. 23, 2007) (contempt finding qualifies under exception because no evidence that judgment was purged and judgment could effect future employment in other state). On the other hand, one could argue that such a test is no less vague than the standard "reasonable" or "substantial" inquiries. Additionally, it may be noteworthy in this context that Minnesota courts consistently refer to the mootness doctrine as "'a flexible discretionary doctrine, not a mechanical rule that is invoked automatically.'" Kahn v. Griffin, 701 N.W.2d 815, 821 (Minn. 2005) (quoting Jasper v. Comm'r of Pub. Safety, 642 N.W.2d 435, 439 (Minn. 2002)).

ders for domestic violence.[77] The defendant argued that his appeal was not moot according to the Connecticut "'capable of repetition, yet evading review' exception to the mootness doctrine."[78] Connecticut courts have construed this provision – loosely analogous to Missouri's "public interest" exception[79] – as requiring that an appeal present a question of "public importance."[80]

While the court rejected the defendant's argument, it determined that his appeals were "rescued from mootness" by an additional exception for collateral consequences, applicable when the appellant demonstrates that "'there is a reasonable possibility that prejudicial consequences will occur.'"[81] Under this standard, "'the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not.'"[82] Thus, where the court would normally not be able to fashion practical relief by reversing the judgment, the doctrine "'acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future.'"[83] According to the court, the burden required to make this determination ensures that there is in fact a real controversy and thus "'provides the necessary limitations on justiciability underlying the mootness doctrine itself.'"[84] Because the court in this instance found that the appellant, although unintentionally, had met his burden of demonstrating a "reasonable possibility" of collateral consequences, the appeal was therefore not moot.[85] Significantly, the court also noted the danger of harm to appellant's reputation was "particularly significant" given that a re-

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77. 900 A.2d 1256, 1258 (Conn. 2006).

78. *Id.* at 1260.

79. *See supra* note 44 and accompanying text.

80. *Putman*, 900 A.2d at 1260 n.8. In full, the exception has three requirements:

> First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot.

Id.

81. *Id.* at 1260, 1261.

82. *Id.* at 1261 (quoting Town of Wallingford v. Dep't of Pub. Health, 817 A.2d 644, 652 (Conn. 2003)).

83. *Id.* (quoting *Town of Wallingford*, 817 A.2d at 652).

84. *Id.* (quoting *Town of Wallingford*, 817 A.2d at 652).

85. *Id.* at 1262. "Thus, the present case fits squarely within the bounds of our prior cases recognizing reputation harm and other potential legal disabilities as collateral consequences of otherwise moot court orders." *Id.*

straining order for domestic violence requires a showing of continuous threat of violence.[86]

The approaches taken by Connecticut and Minnesota clearly represent steps forward in providing appellate courts with a workable mootness analysis that allows for consideration of collateral consequences. These approaches fall short, however, in providing courts with meaningful guidance beyond the bare discretionary authority to hear an otherwise moot appeal upon taking notice of collateral consequences. Accordingly, these approaches fail to give appropriate weight to the concern with ensuring that there is a real controversy fit for adversarial resolution – perhaps the mootness doctrine's most basic principle. In response, the next section will seek to identify the competing concerns that underlie the tension between the mootness doctrine and recognition of collateral consequences, and will propose a new exception that allows for review in compelling circumstances while also requiring the existence of a justiciable controversy.

III. DISCUSSION

A. The Cause of the Inconsistency in Missouri Courts

As previously discussed, Missouri courts have taken essentially three different approaches to appeals of expired orders of protection. Each of these methods, however, is problematic.

First, some Missouri cases have framed the issue as the general application of the Adult Abuse Act or the CPOA, and have allowed an appeal to proceed under the "public interest" exception because the Act's application in similar circumstances is an "issue of general public interest."[87] If the application of the Adult Abuse Act is an issue of general public interest, it necessarily follows that any appeal concerning the Act is not moot, at least up until the Act's application is no longer of general public interest.[88] Taken to its logical extreme, this rationale could compel review in connection with virtually any otherwise moot appeal, as there is always an underlying legal framework in play whose application could recur "in similar factual circumstances."

Second, other rulings have viewed the issue on appeal in the traditional manner, as confined to the appellant's argument, and have accordingly found the appeal moot.[89] These cases, however, have not completely foreclosed appellate review, indicating that in a particularly compelling case the appeal

86. *Id.*

87. *See supra* Part II.C.1.

88. At least one court explicitly recognized and followed this rationale in declining to hear an otherwise moot appeal under the CPOA as "the issues raised involve an application of the [CPOA] that has previously been considered at some length by this court." O'Banion v. Williams, 175 S.W.3d 673, 675 (Mo. App. W.D. 2005).

89. *See supra* Part II.C.2.

would not be moot.[90] The question, of course, is what type of circumstances would be compelling enough, and on that point Missouri courts have been silent. Moreover, in light of the collateral consequences and the difficulty in obtaining review before an order expires, the appearance of a complete bar to review, whether applied strictly or not, raises significant fairness concerns.[91]

Lastly, more recent cases have held that the appellant's vindication, in light of the collateral consequences of the judgment, is sufficiently weighty to implicate the "public interest" exception.[92] As with the second approach, this type of analysis is flatly inconsistent with the requirement of an issue of "general public interest" because vindication is by its very definition only of interest to the individual seeking it.[93] Furthermore, this approach misconceives the purpose of the "public interest" exception. The requirement of a recurring issue of general public interest that will otherwise avoid appellate review is oriented toward the efficient resolution of inconsistency or vagueness in the law through a single court determination. An appeal of an expired order of protection, however, is generally a purely factual matter in which the ramifications of the court ruling are confined to the participating parties.

Examining these three approaches together, it is evident that they reflect two main concerns regarding appeals of expired protective orders that courts are unable to harmonize within the existing analytical framework. First, Missouri courts are understandably reluctant to mandate review of *every* appeal of the grant of a since-expired order of protection due to fears of overloading appellate dockets.[94] Second, courts recognize that while these appeals may not satisfy the requirements of the "public interest" exception, there *is* a certain amount of public interest in allowing an individual to obtain appellate review of an order issued against him given the repercussions of such a judgment.[95]

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90. *See supra* Part II.C.2.

91. *See infra* Part III.C.

92. *See supra* Part II.C.3.

93. *See supra* note 44 and accompanying text.

94. *See infra* Part III.C.

95. *See supra* notes 15-24 and accompanying text; *infra* Part III.C. While courts, commentators, and the public have traditionally focused on the direct consequences of a court judgment – a prison sentence, a fine, an injunction – the collateral consequences of court determinations can be longer-lasting and can potentially have a more significant effect on a person's life. *See* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002) ("[C]ollateral sanctions may make it impossible for convicted persons to be employed, to lead law-abiding lives, to complete probation, or to avoid recidivism.").

B. Lessons from other Jurisdictions

The approaches taken by courts in Minnesota[96] and Connecticut[97] are instructive in identifying the advantages and disadvantages associated with adopting a distinct collateral consequences exception. An analysis of their structure is also helpful in identifying how to properly tailor such an exception in order to maximize the positives and minimize the negatives.[98] In examining these approaches, the analysis in this section will center on three questions. First, does the exception give appellate courts defined standards for determining if the claimed collateral consequences are sufficient, or is that decision ultimately within the court's discretion? Second, to what extent does the exception focus on collateral consequences in terms of the type of judgment involved, as opposed to the nature of the repercussions in the context of the individual appellant? Lastly, who carries the burden, if there is one, of demonstrating that collateral consequences exist?

The Minnesota exception, creating a rebuttable presumption of collateral consequences that preclude mootness where "real and substantial disabilities" result from a judgment,[99] suffers from some key defects. The court's analysis confirms the idea implicit in the "real and substantial disabilities" analysis: the inquiry focuses on the collateral consequences of the type of judgment in general, as opposed to the specific consequences the appellant has suffered.[100] A necessary corollary is that once a court determines that a specific type of judgment qualifies under the exception, courts are required to follow precedent in hearing otherwise moot appeals of that type of judgment, (assuming of course that the underlying consequences referred to are applicable to the case at hand).[101] Moreover, the burden for rebutting the presumption of collateral consequences – demonstrating that there is "no possibility" that

96. *See supra* Part II.D.1.

97. *See supra* Part II.D.2.

98. *See infra* Part III.D.

99. *In re* McCaskill, 603 N.W.2d 326, 329 (Minn. 1999). The exception is also available "[w]here an appellant produces evidence that collateral consequences actually resulted from a judgment." *Id. See also supra* Part II.D.1.

100. *See McCaskill*, 603 N.W.2d at 329-31 (application of exception only focusing on abstract effects of type of judgment).

101. According to the court, the collateral consequences in *McCaskill*, specifically the possibility of future early intervention, are present in every case of the involuntary commitment of a mentally ill person under the statute at issue in the case. *Id.* at 330-31. Thus, *McCaskill* appears to require that appeals of such statutory commitments may never be dismissed as moot. *Cf. In re* Linn, No. A03-264, 2003 WL 22234642, at *6 (Minn. Ct. App. Sept. 30, 2003). In *Linn*, the court declined to hear the otherwise moot appeal of a civil commitment because the commitment, under a different statutory provision than that in *McCaskill*, could not be used to support future early intervention. *Id.* The court in *Linn* went on to conclude that the claimed collateral consequence – that the administration of anti-psychotic drugs could affect appellant's licensing as a registered nurse – was not a "real and substantial disability." *Id.*

such consequences will result[102] – effectively makes rebuttal impossible, given that the court has already determined that "real and substantial disabilities" do exist. The Minnesota court's analysis also indicates that the court itself may permissibly take notice of collateral consequences in order to meet the test,[103] which increases the court's already weighty discretion.[104] Moreover, with the court and the appellant both introducing collateral consequences, the mootness determination can effectively become a one-sided process, especially where the other party chooses not to contest the appeal. This certainly looks like precisely the type of appeal that the mootness doctrine is intended to bar – one in which there is no longer an ongoing, multi-party controversy suited for the adversarial process.

The Connecticut collateral exception is available where the appellant demonstrates a "reasonable possibility" of collateral consequences.[105] Based on the Connecticut Supreme Court's analysis in *Putman v. Kennedy*,[106] it appears that the Connecticut collateral consequences exception also focuses on the type of judgment in determining whether the burden of demonstrating a "reasonable possibility" of collateral consequences has been satisfied.[107] This focus is especially noteworthy given the relatively light burden – "reasonable possibility" may invite claims of fairly speculative future collateral consequences. Furthermore, it is important to note that the court in *Putman* relied on both its own research and the appellant's arguments in finding repercussions sufficient to carry the "reasonable possibility" burden.[108] This directly contradicts the court's own statement that the burden exists in order to ensure that there is a real live controversy.[109]

The above analysis reveals two main deficiencies in the Minnesota and Connecticut approaches. First, by focusing entirely on the type of judgment as opposed to the repercussions for the individual appellant, there is a real danger of abrogating the court's ability to exercise its discretion in circumstances where fairness or efficiency do not dictate review. Second, an exception that allows the court to independently take notice of collateral consequences frustrates the purpose of the mootness doctrine. The existence of an adversarial conflict, or at least a judicially-manufactured burden, is a necessary aspect of a justiciable case that overcomes traditional mootness considerations.

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102. *McCaskill*, 603 N.W.2d at 329.
103. *Id.* at 330-31.
104. *See supra* note 75 and accompanying text.
105. Putman v. Kennedy, 900 A.2d 1256, 1261 (Conn. 2006).
106. *See supra* Part II.D.2.
107. *See Putman*, 900 A.2d at 1261-64.
108. *Id.* at 1263-65.
109. *Id.* at 1261.

C. The Case Against Barring Review

In light of the current split of authority in Missouri courts on whether collateral consequences require review of an otherwise moot appeal,[110] it is necessary for the Missouri Supreme Court to issue a definitive ruling in order to achieve state-wide consistency and predictability. One possible approach, of course, would be to declare that appeals of expired orders of protection are moot and must be dismissed. The potentially serious effect of allowing judgments producing collateral consequences to evade review, however, counsels against a complete bar to review.

Even those cases holding that appeals of expired orders of protection are moot have not completely foreclosed appellate review in all circumstances.[111] Recent commentary has focused to a large degree on the collateral consequences of criminal convictions,[112] while the lasting repercussions of civil judgments have been given comparatively little consideration. On one hand, this makes sense because a criminal judgment will have immediate, discernible, and lasting collateral effects, such as disenfranchisement, loss of eligibility for public benefits, and disqualification from military service.[113] On the other hand, due to these harsh consequences there are significant safeguards protecting against erroneous judgments: the reasonable doubt standard, strict evidentiary rules, and perhaps most significantly, the availability of appellate review.

In the context of Adult Abuse Act and CPOA orders, however, these protections are lacking in a variety of ways. For one, full orders of protections are available upon a showing of abuse by a preponderance of the evidence.[114] Courtroom settings in these situations are also notoriously informal and lacking in substantive evidentiary rules.[115] Due to the available remedies, some commentators have even suggested that the proceedings are being misused as surrogates for divorce and child custody issues.[116] Yet despite these issues, courts and juries may consider prior orders as evidence in future court

110. *See supra* Part II.C.

111. *See supra* Part II.C.2.

112. *See generally* Margaret Colgate Love, *The Debt That Can Never Be Paid: A Report Card on the Collateral Consequences of Conviction*, 21 CRIM. JUST., Fall 2006, at 16 (examining and grading the collateral consequences of conviction on a state-by-state basis). For a thorough discussion of collateral consequences in the criminal context generally, see Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006).

113. Pinard, *supra* note 112, at 635-36.

114. MO. REV. STAT. § 455.040.1 (Supp. 2007).

115. *See* Dunlap, *supra* note 4, at 5.

116. *Id.* at 5-6.

proceedings.[117] An employer may require disclosure of the judgment in connection with a job application. These orders may also affect certain types of licensing and certification.[118] These consequences, combined with the limited protections against erroneous judgments, strongly suggest that there is a compelling need for accessible appellate review, at least in some circumstances.

On the other hand, certain considerations do weigh against mandating the availability of review. Given the number of protective orders issued, appellate dockets could be overloaded if every issued order of protection were reviewable. Courts may also be concerned with giving unscrupulous attorneys the financial motivation to encourage their clients to pursue appeals of erroneously-issued orders where a reversal will have no practical benefit for the client.[119] Additionally, it is often the case that these appeals are uncontested.[120] Allowing an appeal to proceed in such a manner can undermine the very purpose of the mootness doctrine; courts require a live controversy in order to ensure that the issues are resolved in an adversarial proceeding.

Fortunately, however, it is unnecessary to completely disregard these concerns in order to allow for the consideration of collateral consequences in the mootness analysis. Instead, they can be addressed by a narrow collateral consequences exception, tailored to accommodate the interests that weigh in favor and against review of otherwise moot appeals.

D. Proposal

In order to resolve the current inconsistency, this article proposes that the Missouri Supreme Court recognize the tension between the mootness doctrine and collateral consequences and accordingly adopt a distinct, narrowly-defined collateral consequences exception. In order to properly ad-

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117. *See, e.g.*, Williams v. Williams, 965 S.W.2d 451, 457 (Mo. App. W.D. 1998) (noting issuance of full order of protection as evidence in support of trial court denial of visitation rights).

118. *See, e.g.*, MO. REV. STAT. § 210.482.1(1) (Supp. 2007) (juvenile courts in authorizing emergency placement of child in home may first request background check including full orders of protection for every adult household member); MO. REV. STAT. § 210.487.1(1) (Supp. 2007) (foster parent licensing requires background check including full orders of protection for every adult household member); MO. REV. STAT. § 571.104.1(1) (Supp. 2007) ("A concealed carry endorsement . . . shall be suspended or revoked . . . upon the issuance of a valid full order of protection.") Note that these consequences may themselves lead to broader repercussions, for example where an individual requires a concealed carry license in order to carry out his employment as a security guard.

119. For example, if the client already has an extensive criminal record, a reversal will likely have no effect on the claimed collateral consequences.

120. *See, e.g.*, Stiers v. Bernicky, 174 S.W.3d 551, 553 (Mo. App. W.D. 2005) (per curiam); Leaverton v. Lasica, 101 S.W.3d 908, 910 n.4 (Mo. App. S.D. 2003).

dress the competing concerns evident in Missouri decisions,[121] and to avoid the problems inherent in other jurisdictions' approaches,[122] the exception should have three main features.

First of all, the exception should provide a specific standard for determining the existence of collateral consequences – a standard that encompasses both actual and potential repercussions. Here, it is possible to combine the features of direct guidance with a degree of court discretion by combining the Minnesota approach, asking whether "real and substantial disabilities" follow from the judgment,[123] with the Connecticut exception's standard for future consequences.[124] Unlike the somewhat speculative Connecticut standard of a "reasonable possibility" of collateral consequences,[125] this article proposes the adoption of the more manageable and familiar "more likely than not" criterion. In sum, the court would inquire as to whether it is more likely than not that collateral consequences, in the form of "real and substantial disabilities," will result from the judgment.

This type of standard allows the court some discretion in determining whether or not the asserted repercussions are weighty enough to necessitate review, while also offering guidance as to how the court should make that determination. For example, where an appellant claims that the judgment has prevented him from acquiring a gun license, the appellant would need to present evidence that he has attempted to acquire a license and has been unsuccessful due to the judgment. In response, however, the court would have the discretion to decide that hunting methods not involving firearms are available and that the claimed repercussions are therefore not "real and substantial disabilities." Moreover, this standard, emphasizing the individual's unique circumstances, as opposed to the type of judgment, allows for the possibility of rebuttal if the petitioning party seeks to challenge the appeal.[126] For example, a claim that the judgment could affect future employment could be rebutted by showing that the appellant has a record of serious criminal offenses.

Second, the proposed exception should place the burden entirely on the appellant to make the necessary showing by a preponderance of the evi-

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121. *See supra* Part III.A.

122. *See supra* Part III.B.

123. *In re* McCaskill, 603 N.W.2d 326, 329 (Minn. 1999).

124. Putman v. Kennedy, 900 A.2d 1256, 1261 (Conn. 2006).

125. *Id.*

126. This is another disadvantage of the Minnesota and Connecticut approaches. *See supra* Part III.B. While the Minnesota exception states that there is a rebuttable presumption of collateral consequences where "'real and substantial' disabilities attach to a judgment," it can only be rebutted by showing that there is "*no possibility*" of future collateral consequences as a result of the judgment. *McCaskill*, 603 N.W.2d at 329 (emphasis added). It would appear that this would be essentially an impossible standard to overcome when the court has already determined that "real and substantial disabilities" *do* attach to the judgment.

dence.[127] Initially, such a burden will discourage frivolous appeals and appeals in which the repercussions of the judgment are so speculative so as to be unsupportable. And in addition, it also solves the problem of where the court should look in determining if collateral consequences do in fact exist. Furthermore, as it is common for an appeal of an expired protective order to be uncontested,[128] placing the burden on the appellant ensures that the resulting determination is not one-sided, with both the appellant and the court searching for collateral consequences to support the appellant's position.[129] Seen in this light, the burden in effect acts as a surrogate for an adversary.

Third, a collateral consequences exception should require a demonstration of *adverse legal* consequences. Although likely a rare factual situation, a Florida court did confront an appeal claimed not to be moot due to the possibility of beneficial collateral consequences – were the appeal to be heard and the judgment reversed, the appellant would have been able to collect attorney's fees from the other party.[130] While the court ultimately rejected this argument,[131] the prerequisite of *adverse* consequences forecloses the possibility of such a claim. Furthermore, the requirement of *legal* repercussions rules out claims of reputation harm or stigma. There can be no doubt that the issuance of a protective order, for example alleging stalking or domestic violence, can harm an individual's reputation. However, any damage done to a person's reputation through the grant of a protective order is not likely repaired by appellate reversal more than a year later.[132] Moreoever, there is the real danger that terms such as "reputation harm" or "lingering stigma" could become magic words for obtaining appellate review, in that it would be difficult to require or produce demonstrable proof of such repercussions.[133]

In sum, this article proposes a collateral consequences exception to the mootness doctrine, available when an appellant demonstrates that adverse

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127. Missouri appellate courts are permitted to consider matters not in the record in determining whether a case is moot. State *ex rel.* Reed v. Reardon, 41 S.W.3d 470, 473 (Mo. 2001) (en banc) (per curiam) (citing Bratton v. Mitchell, 979 S.W.2d 232, 236 (Mo. App. W.D. 1998); State *ex rel.* Wilson v. Murray, 955 S.W.2d 811, 812 (Mo. App. W.D. 1997)).

128. *See, e.g.*, Stiers v. Bernicky, 174 S.W.3d 551, 553 (Mo. App. W.D. 2005) (per curiam); *In re* A.T.H., 37 S.W.3d 423, 425 n.1 (Mo. App. S.D. 2001). This is likely due to the fact that the petitioning party would seek extension of the order if the circumstances still existed that necessitated the order in the first place, and if those circumstances no longer exist, there is no motivation to oppose the appeal. Additionally, the cost of funding the challenge could be prohibitive for many petitioners.

129. *See, e.g.*, Putman v. Kennedy, 900 A.2d 1256, 1260-64 (Conn. 2006).

130. Lund v. Dep't of Health, 708 So. 2d 645, 646 (Fla. Dist. Ct. App. 1998).

131. *Id.* at 647.

132. While a record of the adjudication is technically available to the public, on a practical level such information has limited public reach beyond what information is actually disseminated by the parties.

133. This result would frustrate the purpose of placing the burden on the appellant and of the mootness doctrine in general.

legal consequences, in the form of real and substantial disabilities, have resulted or will more likely than not result from the judgment. It is important to emphasize that this exception would not represent a drastic change in results, only in doctrine, as Missouri courts are already creating inconsistency through the bending of established principles.[134] A distinct exception, such as the one proposed in this article, would recognize the current analysis and seek to promote consistent results.

IV. CONCLUSION

An appeal of an expired protective order causing ongoing collateral consequences may be technically moot, but on a practical level it may represent a real controversy requiring resolution. Collateral consequences can have a significant impact on an individual's life, and allowing such judgments to evade review undermines society's confidence in the fairness of our court system. Missouri courts, recognizing this dilemma, have attempted to incorporate consideration of collateral consequences into the existing mootness doctrine. At the same time, courts have also recognized that appellate review is not desirable or justified in all cases in which an appellant claims that he continues to be negatively affected by an otherwise moot judgment. Accordingly, the adoption of a collateral consequences exception, tailored to weed out these situations while permitting review in compelling circumstances, serves to address both concerns. Going beyond the discussion of expired protective orders under the Adult Abuse Act and the CPOA, such an exception is both practical and desirable because it addresses the basic principles underlying the mootness doctrine. In adopting such a mootness exception for collateral consequences, the Missouri Supreme Court would therefore be serving the dual aims of promoting fairness and resolving inconsistency in Missouri law – two purposes that are the very foundation of appellate review.

ZACHARY C. HOWENSTINE

134. *See supra* Part III.C.